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7                   UNITED STATES DISTRICT COURT  
8                   WESTERN DISTRICT OF WASHINGTON  
9                   AT SEATTLE

10 ME2 PRODUCTIONS, INC,

Case No. C16-1953RSL

11                   Plaintiff,

12                   ORDER GRANTING IN PART ME2's  
13                   MOTIONS FOR DEFAULT  
14                   JUDGMENT

v.

14 WHENDI PHIPPS, *et al.*,

15                   Defendants.

16                   **I. INTRODUCTION**

17                  This matter comes before the Court on plaintiff ME2 Productions, Inc.'s motions  
18 for default judgment against defendants Whendi Phipps (Dkt. #52) and Barbara Collins  
19 (Dkt. #54). Having reviewed the relevant briefing and the remainder of the record,  
20 ME2's motions for default judgment are GRANTED IN PART and DENIED IN PART.  
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23                   **II. BACKGROUND**

24                  The two motions for default judgment that are the subject of this Order are just a  
25 portion of the more than eighty default judgment motions ME2 has filed in nineteen  
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1 cases before this Court.<sup>1</sup> All of the cases assert the same causes of action. ME2 alleges  
2 that hundreds of individual defendants unlawfully infringed its exclusive copyright to  
3 the motion picture *Mechanic: Resurrection*, which it developed and produced, by  
4 copying and distributing the film over the Internet through a peer-to-peer network using  
5 the BitTorrent protocol. Plaintiff served internet service providers (“ISP”s) with  
6 subpoenas in order to identify the alleged infringers. Amended complaints identifying  
7 defendants by name were subsequently filed.

10 Defendants Phipps and Collins (collectively “Defendants”) are named in the  
11 same complaint because, given the unique identifier associated with a particular digital  
12 copy of *Mechanic: Resurrection* and the timeframe in which the internet protocol  
13 address associated with each Defendant accessed that digital copy, ME2 alleges the  
14 named Defendants were all part of the same “swarm” of users that reproduced,  
15 distributed, displayed, and/or performed the copyrighted work. According to ME2,  
16 Defendants directly or indirectly shared, downloaded, and distributed a single unique  
17 copy of *Mechanic: Resurrection* that had been seeded to the torrent network at some  
18 undefined point in the past.

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<sup>1</sup> See Case Nos. C16-1881RSL, C16-1882RSL, C16-1950RSL, C16-1953RSL, C16-1955RSL, C17-  
25 0099RSL, C17-0100RSL, C17-0181RSL, C17-0182RSL, C17-0246RSL, C17-0248RSL, C17-0250RSL,  
26 C17-0465RSL, C17-0466RSL, C17-0783RSL, C17-0893RSL, C17-1077RSL, C17-1220RSL, and C17-  
1221RSL.

27 Two other cases, C16-1776RSL and C16-1778RSL were dismissed for failure to timely served  
28 and refiled as C17-0246RSL and C17-0248RSL, respectively. A final case, C17-694RSL, was closed in  
August 2017.

1 Defendants did not respond to ME2's complaint. The Clerk of Court therefore  
2 entered default against Defendants at ME2's request. See Dkts. #43 and #45. ME2 now  
3 seeks judgment against each Defendant.

4

### 5 III. DISCUSSION

6 Federal Rule of Civil Procedure 55(b) authorizes a court to grant default  
7 judgment. Prior to entering judgment in defendant's absence, the Court must determine  
8 whether the allegations of a plaintiff's complaint establish his or her liability. Eitel v.  
9 McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). The court must accept all well-pled  
10 allegations of the complaint as established fact, except allegations related to the amount  
11 of damages. TeleVideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987).  
12 Where the alleged facts establish a defendant's liability, the court has discretion, not an  
13 obligation, to enter default judgment. Alan Neuman Productions, Inc. v. Albright, 862  
14 F.2d 1388, 1392 (9th Cir. 1988). If plaintiff seeks an award of damages, it must provide  
15 the Court with evidence to establish the amount. TeleVideo Sys., 826 F.2d at 917-18.  
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#### 18 A. Liability Determination.

19 The allegations in ME2's complaint establish Defendants' liability for direct  
20 copyright infringement. To establish direct infringement, ME2 must demonstrate  
21 ownership of a valid copyright and that Defendants copied "constituent elements of the  
22 work that are original." L.A. Printex Indus., Inc. v. Aeropostale, Inc., 676 F.3d 841, 846  
23 (9th Cir. 2012) (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361  
24 (1991)). Here, ME2 alleges it owns the exclusive copyright to the motion picture  
25 *Mechanic: Resurrection* and that Defendants participated in a "swarm" to unlawfully  
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1 copy and/or distribute the same unique copy of *Mechanic: Resurrection*. These  
2 allegations were established by entry of default against Defendants. Accordingly, ME2  
3 has established Defendants' liability for direct copyright infringement.  
4

5       B. Default Judgment is Warranted.

6       Having established liability, plaintiff must also show that default judgment is  
7 warranted. Courts often apply the factors listed in Eitel, 782 F.2d at 1471-72, to make  
8 this determination. Those factors are:  
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10      “(1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's  
11 substantive claim, (3) the sufficiency of the complaint, (4) the sum of  
12 money at stake in the action; (5) the possibility of a dispute concerning  
13 material facts; (6) whether the default was due to excusable neglect, and  
14 (7) the strong policy underlying the Federal Rules of Civil Procedure  
15 favoring decisions on the merits.”

16      The majority of these factors weigh in favor of granting default judgment against  
17 Defendants. ME2 may be prejudiced without the entry of default judgment as it will be  
18 left without a legal remedy. See Landstar Ranger, Inc. v. Parth Enters., Inc., 725 F.  
19 Supp.2d 916, 920 (C.D. Cal. 2010). ME2's complaint sufficiently alleges a claim of  
20 direct copyright infringement, and Defendants did not present any evidence or argument  
21 to the contrary. Additionally, the Court finds there is a low probability that default against  
22 Defendants was due to excusable neglect: Defendants were given ample opportunity to  
23 respond to the filings in this matter between the time they were served with ME2's  
24 complaint and when ME2 filed its motions for default judgment. Finally, although there  
25 is a strong policy favoring decisions on the merits, the Court may consider Defendants'  
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1 failure to respond to ME2's requests for default and default judgment as admissions that  
2 the motions have merit. LCR 7(b)(2).

3 The Court acknowledges that a dispute concerning the material facts alleged by  
4 ME2, including the identity of the alleged infringers, could arise in this case. The Court  
5 also acknowledges that the amount at stake may be significant depending on the means  
6 of each Defendant. ME2 seeks enhanced statutory damages in the amount of at least  
7 \$1,500 along with attorneys' fees in excess of \$1,550 and costs in excess of \$100 from  
8 each individual Defendant. Notwithstanding these considerations, the Eitel factors  
9 weigh in favor of granting default judgment against Defendants.

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11 C. Appropriate Relief.

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13 ME2 requests entry of a default judgment against each Defendant providing the  
14 following three categories of relief: (1) permanent injunctive relief; (2) statutory  
15 damages; and (3) attorney's fees and costs. Each category is discussed below.

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17 i. *Permanent Injunctive Relief*

18 Permanent injunctive relief is appropriate. Section 502(a) of Title 17 of the  
19 United States Code allows courts to "grant temporary and final injunctions on such  
20 terms as it may deem reasonable to prevent or restrain infringement of a copyright." As  
21 part of a default judgment, courts may also order the destruction of all copies of a work  
22 made or used in violation of a copyright owner's exclusive rights. 17 U.S.C. § 503(b).  
23 Given the nature of the BitTorrent protocol and Defendants' participation therein, the  
24 Court finds Defendants possess the means to continue infringing in the future. MAI Sys.  
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26 Corp. v. Peak Comput., Inc., 991 F.2d 511, 520 (9th Cir. 1993) (granting permanent  
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1 injunction where “liability has been established and there is a threat of continuing  
2 violations.”). Consequently, the Court will issue a permanent injunction enjoining  
3 Defendants from infringing ME2’s rights in *Mechanic: Resurrection* and directing them  
4 to destroy all unauthorized copies of *Mechanic: Resurrection*.  
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6           ii.     *Statutory Damages*

7           Plaintiff requests an award of statutory damages in the amount of at least \$1,500  
8 against each Defendant for his or her participation in the BitTorrent swarm that resulted  
9 in the unauthorized download and/or distribution of the seed file containing *Mechanic:*  
10 *Resurrection*. Although the actual economic damages associated with a lost video rental  
11 are likely minimal, plaintiff correctly points out that Congress has authorized statutory  
12 damages in significant amounts to compensate for difficult-to-prove downstream losses  
13 and to deter future infringement. Los Angeles News Serv. v. Reuters Int'l, Ltd., 149  
14 F.3d 987, 996 (9th Cir. 1998) (quoting Peer Int'l Corp. v. Pausa Records, Inc., 909 F.2d  
15 1332, 1336 (9th Cir. 1990)). Under 17 U.S.C. § 504(c)(1), the Court may award  
16 statutory damages “for all infringements involved in the action, with respect to any one  
17 work, . . . for which any two or more infringers are liable jointly and severally, in a sum  
18 of not less than \$750 or more than \$30,000 as the court considers just.” The Court has  
19 wide discretion when determining the amount of statutory damages and takes into  
20 consideration the amount of money requested in relation to the seriousness of the  
21 defendant’s conduct, whether large sums of money are involved, and whether “the  
22 recovery sought is proportional to the harm caused by defendant’s conduct.” Curtis v.  
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1       Illumination Arts, Inc., 33 F. Supp.3d 1200, 1212 (W.D. Wash. 2014) (citing Landstar,  
2       725 F. Supp. 2d at 921).

3              Copyright violations come in all shapes and sizes, from the unauthorized copying  
4       of a Halloween word puzzle for a child's party to the unauthorized manufacture and sale  
5       of millions of bootleg copies of a new release. While Defendants' alleged copyright  
6       violation is of concern in that it represents a theft of intellectual property, it is a  
7       relatively minor infraction causing relatively minor injury. ME2 has not shown that any  
8       of the Defendants is responsible for the "seed" file that made ME2's copyrighted work  
9       available on the BitTorrent network, nor has ME2 presented evidence that Defendants  
10      profited from the infringement in any way. Given the range of statutory damages  
11      specified in the Copyright Act, the Court finds that an award of \$750 for the swarm-  
12      related infringements involved in this action is appropriate. Each of the Defendants is  
13      jointly and severally liable for this amount.  
14

15              This award is in line with the awards made by other courts in the Ninth Circuit  
16      and appears adequate to deter Defendants from infringing on plaintiff's copyright in the  
17      future.<sup>2</sup> Plaintiff argues that a significantly higher award is necessary to force people  
18      like Defendants to appear and participate in these BitTorrent cases. Plaintiff apparently  
19      wants the Court to raise the statutory damage award to an amount that is at or above the  
20      anticipated costs of defending this action. A defendant may, however, decide that  
21     

22      <sup>2</sup> ME2 has presented no evidence that Defendants will not be dissuaded from infringing in the future. The  
23      judgment entered in this case, including statutory damages, attorney's fees, and costs, may be recovered  
24      by garnishing Defendants' wages and/or seizing and selling their non-exempt property. This is a steep  
25      penalty for having been too lazy to go to the local Redbox or too cheap to pay a few dollars for an  
26      authorized download. Plaintiff offers no evidence to support its contention that personal liability for a  
27      judgment in excess of \$500 is of no consequence to the judgment debtor.

conceding liability through default is the best course of action given the nature of the claims and the available defenses. The “punishment” for that choice is the entry of default judgment and an award of damages under the governing standards. As discussed above, those standards lead to the conclusion that the minimum statutory penalty should apply in this case. Plaintiff offers no support for the proposition that participation in federal litigation should be compelled by imposing draconian penalties that are out of proportion to the harm caused by Defendants’ actions or any benefits derived therefrom. Statutory damages are not intended to serve as a windfall to plaintiffs and will not be used to provide such a windfall here.

The Court will award ME2 \$750 in statutory damages for the infringements involved in this action, for which defendants are jointly and severally liable.

iii. *Attorneys’ Fees and Costs*

Finally, ME2 asks the Court to award between \$1,559.50 and \$1,617.50 in attorneys’ fees and between \$103.00 and \$153.00 in costs against each Defendant in this matter. Pursuant to 17 U.S.C. § 505, the Court “in its discretion may allow the recovery of full costs by or against any party,” and “may also award a reasonable attorney’s fee to the prevailing party as part of the costs.”

The Court agrees that ME2 should be awarded attorneys’ fees. Courts consider several factors, including “(1) the degree of success obtained, (2) frivolousness, (3) motivation, (4) objective unreasonableness (legal and factual), and (5) the need to advance considerations of compensation and deterrence,” when making attorneys’ fee determinations under the Copyright Act. Smith v. Jackson, 84 F.3d 1213, 1221 (9th Cir.

1 1996) (citing Jackson v. Axton, 25 F.3d 884, 890 (9th Cir. 1994)). Because ME2 has  
2 succeeded on its non-frivolous direct infringement claim<sup>3</sup> and because an award would  
3 advance considerations of compensation and deterrence, ME2 is entitled to attorneys'  
4 fees.  
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6 However, despite counsel's efforts to allocate the fees and costs to each  
7 individual defendant, the overall fee request is problematic. Courts determine the  
8 amount of a fee award by determining a "lodestar figure," which is obtained by  
9 multiplying the number of hours reasonably expended on a matter by a reasonable  
10 hourly rate. Intel Corp. v. Terabyte Int'l, Inc., 6 F.3d 614, 622 (9th Cir. 1993). Courts  
11 may then adjust the lodestar with reference to factors set forth in Kerr v. Screen Extras  
12 Guild, Inc., 526 F.2d 67, 69-70 (9th Cir. 1975), to the extent those factors are not  
13 already subsumed in counsel's hourly rates or the number of hours expended on the  
14 litigation. The relevant Kerr factors here are: (1) the time and labor required; (2) the  
15 novelty and difficulty of the questions; and (3) the skill requisite to perform the legal  
16 services properly.  
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19           1. *Reasonableness of Rate Requested*  
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22 In the Ninth Circuit, the determination of a reasonable hourly rate "is not made  
23 by reference to rates actually charged the prevailing party." Chalmers v. City of Los  
24 Angeles, 796 F.2d 1205, 1210 (9th Cir. 1986). Instead, the reasonable hourly rate is  
25 determined with reference to the prevailing rates charged by attorneys of comparable  
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28 <sup>3</sup> Despite the entry of default, the Court specifically declines to enter judgment in plaintiff's favor on its  
indirect and contributory infringement claims.

1 skill and experience in the relevant community. Blum v. Stenson, 465 U.S. 886, 895  
2 (1984). “Generally, when determining a reasonable hourly rate, the relevant community  
3 is the forum in which the district court sits.” Camacho v. Bridgeport Fin., Inc., 523 F.3d  
4 973, 979 (9th Cir. 2008). Courts may also consider “rate determinations in other cases,  
5 particularly those setting a rate for the plaintiffs’ attorney” as “satisfactory evidence of  
6 the prevailing market rate.” United Steelworkers of Am. v. Phelps Dodge Corp., 896  
7 F.2d 403, 407 (9th Cir. 1990).

8  
9 Identifying counsel’s hourly rate is more challenging than it should be. His  
10 hourly rate for “normal” intellectual property cases is now \$545/hour, but he has agreed  
11 to a reduced rate of \$350/hour in this case. Dkt. #53 at ¶7. In a similar BitTorrent matter  
12 involving another copyright holder, counsel stated that his reduced rate was \$450/hour  
13 (LHF Prods., Inc. v. Acosta, C16-1175RSM, Dkt. #71 at ¶7), which is the rate he posits  
14 is “reasonable and warranted in the Seattle area” in this case (Dkt. #53 at ¶9). The Court  
15 assumes, based on the fee calculation charts set forth in counsel’s declarations, that he  
16 seeks an hourly rate of \$350 in this case. This hourly rate is generally within the norm  
17 for BitTorrent cases in this district and is a reasonable rate for the type of formulaic  
18 legal work performed in these matters.

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23       2. *Reasonableness of Hours Requested*

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25 Turning to the reasonableness of the hours requested, plaintiff has the burden of  
26 documenting the hours expended on this matter and establishing their reasonableness.  
27 Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). The Court will exclude hours that are  
28 “excessive, redundant, or otherwise unnecessary” and therefore not reasonably

1 expended. *Id.* at 434. Counsel has attempted to calculate the hours spent in connection  
2 with ME2's claims against each individual Defendant by dividing the total number of  
3 hours spent on collective efforts by the total number of defendants at the time the action  
4 was taken. Time spent working solely in pursuit of claims against an individual are  
5 allocated wholly to that individual. Dkt. #53 at ¶10. Taking Phipps as an example,  
6 counsel seeks compensation for the following activities:  
7

Activity	Attorney Time	Legal Assistant Time
Review evidence of BitTorrent activity giving rise to potential claims	.4 hours	
Prepare complaint and supporting exhibits	.4 hours	
Prepare and file motion to expedite discovery	.4 hours	
Communicate with client	.1 hours	
Review Court orders	≈ .2 hours	
Prepare subpoena and letter to ISPs	.1 hours	.3 hours
Review ISP response and prepare communications with Defendant	.1 hours	.2 hours
Review Defendant's "status and history"	.3 hours	
Prepare amended complaint and review	≈ .5 hours	
Prepare, review, and file waivers and/or summons	≈ .2 hours	.6 hour
Review file	≈ .1 hours	
Prepare and file motion for default	≈ .2 hours	
Prepare and file motion for default judgment	1 hour	
Total:	4 hours	1.1 hours

23 These seemingly modest time expenditures mask the reality of counsel's fee request.  
24

25 Until recently, the BitTorrent cases filed in this district all proceeded in a similar  
26 manner.<sup>4</sup> The original complaints list Doe defendants, identified only by IP addresses,  
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28 <sup>4</sup> The Honorable Thomas S. Zilly has required certain additional disclosures or proffers in BitTorrent cases pending before him. See Venice PI, LLC v. O'Leary, C17-0988TSZ, Dkt. # 32.

1 and allege infringement of the client's exclusive rights in a specified motion picture.  
2 Groups of Doe defendants are named in the same complaint because they allegedly  
3 infringed the same digital copy of the copyrighted material by participating in the same  
4 BitTorrent "swarm." The nearly identical complaints are accompanied by nearly  
5 identical motions for expedited discovery. Once the Court grants leave to conduct  
6 expedited discovery, subpoenas are served on the ISP associated with the addresses  
7 identified in the log attached to the complaint as Exhibit B. Once in possession of the  
8 Doe defendants' identities, counsel attempts to obtain a settlement of the claims and  
9 files amended complaints against any non-settling defendants. Service, additional  
10 settlements, and defaults/default judgments follow, with the exception of a handful of  
11 defendants who are actively litigating the cases in this district. On occasion, counsel  
12 seeks an extension of time in which to serve.

16       Almost every filing in this cause of action was essentially copied from scores of  
17 other cases filed by the same counsel.<sup>5</sup> There is nothing wrong with utilizing form  
18 documents to pursue identical infringement claims arising from identical activities. As  
19 has been previously noted, however, it is wrong for ME2's counsel to file identical  
20 complaints and motions with the Court and then expect the Court to believe that he  
21 labored over each filing. LHF Prods., C16-1175RSM, Dkt. #73 at 12. To arrive at his  
22 per Defendant fee request, counsel divided time entries related to specific activities by  
23 the number of defendants then in the case. When the relatively small time allotments set

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28       <sup>5</sup> The one exception was when the Court dismissed ME2's claims against ten defendants for failure to  
timely file proofs of service and it was forced to seek reinstatement of those claims.

1 forth in counsel's declaration related to Phipps are multiplied by the number of  
2 defendants, counsel is seeking compensation for an excessive number of hours. Counsel  
3 apparently spent 6.8 hours studying the log of infringing transactions and IP addresses  
4 that gave rise to this particular lawsuit.<sup>6</sup> He spent another 6.8 hours generating a  
5 complaint that is virtually identical to the complaints ME2 filed in other cases (not to  
6 mention the scores of BitTorrent cases filed on behalf of other clients). Altering the  
7 form complaint to initiate a new lawsuit is, at this point, a word processing chore: the  
8 preparer checks to make sure the correct plaintiff and film are identified, changes the  
9 number of Doe defendants in the caption, inserts the correct IP addresses in the section  
10 of the complaint describing the defendants, and attaches the investigator's log regarding  
11 the relevant swarm as Exhibit B. Charging 6.8 hours of attorney time for this task is  
12 unreasonable. Counsel seeks to recover fees for another 6 hours spent preparing an  
13 amended complaint that was identical to the original except for the caption and the  
14 correlation of the IP addresses with the subscribers' names.

15 A form pleading and motions practice such as this simply does not take the type  
16 of expertise or time that is normally associated with intellectual property matters. Nor  
17 does it justify the number of cumulative hours that counsel seeks here. Having reviewed  
18 the billing records and dockets in this and other similar matters, the Court finds that the  
19 bulk of the "legal" work in these cases was performed and compensated years ago, that  
20 these actions now involve far more word processing than drafting or legal analysis, and  
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28 <sup>6</sup> This case was originally filed against seventeen Doe defendants.

1 that the attorney time necessary to tailor documents to each case and/or individual is  
2 minimal. The Court will award 1 hour, at an hourly rate of \$350, to compensate ME2  
3 for counsel's time spent pursuing its claims against each named Defendant, and 1.3  
4 hours, at an hourly rate of \$145.00, to compensate ME2 for legal assistant time altering  
5 pleadings, motions, and service documents. The Court is satisfied that an attorneys' fee  
6 of \$538.50 per Defendant is reasonable and sufficient to cover the form-pleading work  
7 required by this case.  
9

10                   3.        *Costs*

11                  ME2 requests between \$103.00 and \$153.00 in costs from each Defendant,  
12 depending on expenses related to service. Recovery of a pro rata portion of the filing fee  
13 and the individual costs associated with the third-party subpoena and service is  
14 appropriate.  
16

17                   **IV. CONCLUSION**

18                  The Court, having reviewed the motions for default judgment and the remainder  
19 of the record, finds adequate bases for default judgment. Accordingly, the Court hereby  
20 finds and ORDERS:  
21

22                  1. ME2's motions for default judgment (Dkts. #52 and #54) are GRANTED IN  
23 PART and DENIED IN PART.

24                  2. Defendants Phipps and Collins are hereby permanently enjoined infringing  
25 ME2's exclusive rights in the motion picture film *Mechanic: Resurrection*,  
26 including without limitation by using the Internet to reproduce or copy  
27 *Mechanic: Resurrection*, to distribute *Mechanic: Resurrection*, or to make  
28 *Mechanic: Resurrection* available for distribution to the public, except  
pursuant to lawful written license or with the express authority of ME2;

3. To the extent any unauthorized reproduction or copy of *Mechanic: Resurrection* is in Defendants' possession or subject to their control, they are directed to destroy it;
4. Defendants are jointly and severally liable for statutory damages in the amount of \$750;
5. Defendant Whendi Phipps is individually liable for attorneys' fees in the amount of \$538.50 and costs in the amount of \$103.00.
6. Defendant Barbara Collins is individually liable for attorneys' fees in the amount of \$538.50 and costs in the amount of \$153.00.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment in favor of plaintiff and against defendants for the amounts specified in this Order.

Dated this 9th day of August, 2018.

Robert S. Lasnik  
Robert S. Lasnik  
United States District Judge